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No. 88-1620

In the Supreme Court of the United States

OCTOBER TERM, 1988

EDWARD J. PETRUS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the obstruction of justice statute, 18 U.S.C. 1503, is violated by efforts to influence the testimony of a grand jury witness.

2. Whether the Medicare and Medicaid fraud statutes, 42 U.S.C. 1395nn and 1396h, reach all material misrepresentations made in connection with claims for payment or only those misrepresentations concerning claims for services that were not actually performed.

3. Whether petitioner's guilty plea was voluntary.

4. Whether petitioner was denied the effective assistance of counsel.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-30) is unpublished, but the decision is noted at 862 F.2d 873 (Table).

JURIDICTION

The judgment of the court of appeals was entered on December 1, 1988. A petition for rehearing was denied on January 3, 1989. The petition for a writ of certiorari was filed on February 28, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a medical doctor, pleaded guilty in the United States District Court for the Western District of Texas to two counts of submitting false Medicare and

Medicaid claims, in violation of 42 U.S.C. 1395nn(a)(2) and 1396h(a)(2), and one count of obstructing justice by attempting improperly to influence the testimony of a witness before a federal grand jury, in violation of 18 U.S.C. 1503. Petitioner was sentenced to consecutive three-year terms of imprisonment on each count and was fined a total of $55,000. Petitioner did not take a direct appeal from his conviction, but he subsequently filed a motion pursuant to 28 U.S.C. 2255 seeking to vacate his sentence. After a hearing, the district court denied relief, and the court of appeals affirmed (Pet. App. 1-30).

1. Petitioner was initially charged in a 36-count indictment. Pursuant to a plea agreement, petitioner agreed to plead guilty to Count 10 (charging Medicare fraud), Count 24 (charging Medicaid fraud), and Count 31 (charging an obstruction of justice).[1] See Tr. 23.

At the ensuing guilty plea hearing, petitioner stated that he understood the terms of the plea agreement, and he entered pleas of guilty to each of the three designated counts (Tr. 23-24). To ensure that petitioner was aware of the nature of the charges, the court had the prosecutor read each of the three counts in open court (Tr. 25-26). The court then inquired whether petitioner did what was alleged in the indictment, to which petitioner responded, "Yes, sir, I goofed. * * * I made a mistake, and I think that those counts are correct" (Tr. 27).

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[1] Petitioner had originally agreed to plead guilty to Count 15 (a Medicare fraud count) instead of Count 10 (Tr. 6). The court refused to accept his plea to Count 15, however, after petitioner expressed an unwillingness to acknowledge guilt on that charge (Tr. 19). When the government announced that it would withdraw from the plea agreement because of petitioner's unwillingness to acknowledge guilt on each count (Tr. 20-21), petitioner renegotiated the plea bargain to substitute Count 10 for Count 15 (Tr. 22-23).

The district court then asked the prosecutor to summarize the government's evidence. In a detailed recitation (Tr. 27-69), the prosecutor stated that petitioner, an opthalmologist, was suspended from participation in the Medicare and Medicaid programs in May 1983. Tr. 37. Petitioner subsequently hired two opthalmologists on a part-time basis, obtained Medicare/Medicaid provider numbers for them, and directed his office manager to bill all Medicare/Medicaid services rendered by the office to those numbers. Thereafter, with respect to the conduct charged in Counts 10 and 24, petitioner performed medical services for patients at times when the part-time doctors were not present at the office and then obtained Medicare/Medicaid reimbursement based on fraudulent representations that the part-time doctors, as authorized health care providers, had performed the services (Tr. 40-42, 48). With respect to the obstruction of justice charged in Count 31, petitioner telephoned one of the part-time doctors, who had been subpoenaed to testify before the grand jury, and urged him to testify falsely that he did not remember events that might incriminate petitioner (Tr. 54-59).

After this lengthy recitation of the factual basis supporting the charges, the district court asked petitioner whether he did what the government had alleged. Petitioner said that he "agree[d] on the three counts" (Tr. 70), but then he added (*ibid.*):

> [T]here are a lot of aspects of the testimony from the Government where we differ in opinion.
>
> But one of the things that I said in the beginning was that I had made some errors, that I had made some mistakes, and that it is not that clear-cut and dry.
>
> The three—the two episodes that were brought up, they should never have occurred. They were done in error and it's my office, and I am responsible for what

comes out of the office and I own up to that responsibility.

When the court explicitly asked again whether petitioner "agree[d] with the prosecutor's summary as to what you did with regard to those three counts," petitioner responded, "[a]pproximately, yes" (*ibid.*).

Under further questioning, petitioner stated that he had discussed the case with his attorney (Tr. 71, 74-75); that he understood "quite well" the particulars of the charges against him (Tr. 75-76); that he was knowingly and voluntarily relinquishing his procedural rights to contest the charges in favor of pleading guilty (Tr. 71-72, 77); and that he was pleading guilty because he was, in fact, guilty (Tr. 73-74). As petitioner stated, "I am pleading guilty because * * * there were episodes that occurred that were not correct and that I made no special effort to correct them, and because I made no special effort I really feel that I am responsible for those" (Tr. 73). Satisfied that petitioner understood the charges and was acting freely and voluntarily, the court accepted the plea (Tr. 79).

2. Petitioner subsequently filed a motion under 28 U.S.C. 2255 collaterally attacking his convictions on two grounds: (1) that his guilty plea had not been knowingly and voluntarily entered; and (2) that he had not received the effective assistance of counsel in connection with the entry of his guilty plea. The court of appeals agreed with the district court that petitioner was not entitled to relief. Pet. App. 1-30. The court held that when petitioner pleaded guilty, he was fully apprised of the charges against him, he understood those charges, and he admitted that he was guilty of the charges. Pet. App. 13-18. The court found that there was an adequate factual basis for the plea on the fraud counts since the pertinent statutes required the gov-

ernment to show only that misrepresentations were made in connection with claims for payment, and not that patients failed to receive the services for which the claims were submitted. Pet. App. 14-16.

The court of appeals also held that petitioner's myriad complaints about the alleged ineffectiveness of his counsel during the plea proceedings were insubstantial. Pet. App. 19-30. The court particularly noted that counsel could not be faulted for failing to attack the applicability of the general obstruction of justice statute, 18 U.S.C. 1503, to petitioner's conduct of attempting to suborn perjury, since controlling precedent within the circuit established that petitioner's conduct fell within the reach of that statute (Pet. App. 24).

ARGUMENT

1. Petitioner first contends (Pet. 10-23) that his conviction under 18 U.S.C. 1503 was improper because prosecutions for obstructing justice by tampering with witnesses may be brought only under 18 U.S.C. 1512. That contention warrants no further review.[2]

The witness tampering statute, 18 U.S.C. 1512, prohibits misleading conduct toward a witness and the use of physical force against a witness in order to prevent him from testifying. The obstruction of justice statute, 18 U.S.C. 1503, prohibits attempts to influence jurors or court officers as well as other efforts to obstruct the due administration of justice. Prior to its amendment in 1982,

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[2] This Court has recently denied certiorari in several cases raising the same claim. See *Cooper* v. *United States*, 109 S. Ct. 1354 (1989); *Branch* v. *United States*, 109 S. Ct. 816 (1989); *Risken* v. *United States*, 479 U.S. 923 (1986); *Rovetuso* v. *United States*, 474 U.S. 1076 (1986); *Cooper* v. *United States* and *Wesley* v. *United States*, 471 U.S. 1130 (1985).

Section 1503 also expressly prohibited endeavoring to "influence, intimidate, or impede any witness," or injuring "any party or witness in his person or property * * * on account of his testifying or having testified" (18 U.S.C. 1503 (1976 & Supp. V 1981)). When the witness tampering statute was enacted in 1982, Congress amended Section 1503 by removing the above-quoted prohibitions. Congress did not, however, alter the "omnibus" or "residual" clause of Section 1503 in any way. That clause generally prohibits "influenc[ing], obstruct[ing], or imped[ing], or endeavor[ing] to influence, obstruct, or impede, the due administration of justice * * *."

Prior to the 1982 amendment, courts regularly upheld prosecutions under the omnibus provision involving endeavors to influence the testimony of a witness (see, *e.g.*, *United States* v. *Johnson,* 605 F.2d 729, 730-731 (4th Cir. 1979), cert. denied, 444 U.S. 1020 (1980)), as well as endeavors to prevent witnesses from testifying (see, *e.g.*, *United States* v. *Schaffner,* 715 F.2d 1099, 1103 (6th Cir. 1983); *United States* v. *McCarty,* 611 F.2d 220, 224 (8th Cir. 1979), cert. denied, 445 U.S. 930 (1980); *United States* v. *Missler,* 414 F.2d 1293, 1306 (4th Cir. 1969), cert. denied, 397 U.S. 913 (1970)). We submit that the 1982 amendment to Section 1503, which did not alter the omnibus clause, did not affect the validity of this line of cases.

When Congress amends part of a statute but leaves another part intact—as it did in the case of Section 1503—the two provisions are given "as full a play as possible." *Markham* v. *Cabell,* 326 U.S. 404, 411 (1945). By retaining the omnibus clause of Section 1503, Congress left undisturbed the pre-1982 decisions holding that the clause reached efforts to influence witnesses as well as to prevent them from testifying. Consequently, Congress did not consolidate all the prohibitions against obstructions of justice relating to witnesses under the newly enacted Sec-

tion 1512, as petitioner argues. That construction is reasonable because Sections 1503 and 1512 are directed at different goals: Section 1503 protects judicial proceedings against corruption by whatever means, while Section 1512 is designed to protect the witnesses themselves.

Because efforts to obstruct justice by improperly influencing witnesses can injure the integrity of the system of justice as well as the interests of the witnesses themselves, there is nothing anomalous in a scheme that permits certain obstructions of justice involving witnesses to be prosecuted under either provision. In the first case to address the issue after the enactment of the 1982 legislation, however, the Second Circuit took the view that Congress intended crimes against witnesses to be dealt with exclusively by Section 1512. *United States* v. *Hernandez,* 730 F.2d 895 (1984). In *Hernandez,* the defendant was convicted of threatening a witness in order to obtain documentary evidence, in violation of Section 1503. The court of appeals vacated his conviction under Section 1503 on the ground that the 1982 amendments had made his conduct punishable only under Section 1512. There is some ambiguity, however, in the court's rationale. The court stated at one point that Congress "intended to remove witnesses entirely from the scope of § 1503" (730 F.2d at 898). Elsewhere in its opinion, however, the court stated that "Congress intended that *intimidation* and *harassment* of witnesses should thenceforth be prosecuted under § 1512 and no longer fall under § 1503" (*id.* at 899 (emphasis added)). That characterization of the court's holding is significantly narrower than the court's earlier characterization, because under the latter, most nonviolent conduct toward witnesses, such as the subornation of perjury that was involved in this case, would still be subject to prosecution under the omnibus clause of Section 1503. Since the facts in *Hernandez* involved intimidation, the court's narrower

statement is its holding. See *United States* v. *Marrapese*, 826 F.2d 145, 147-148 (1st Cir.), cert. denied, 108 S. Ct. 331 (1987) (broad language in *Hernandez* is dictum). Accordingly, not until the Second Circuit has occasion to consider the issue in a case where a witness is neither intimidated nor harassed will it be clear whether the Second Circuit regards the 1982 amendment to Section 1503 as having removed from that statute all prohibitions with respect to witnesses.[3]

The position taken by the Second Circuit with regard to witness tampering has been rejected by every other circuit that has addressed the issue.[4] Nonetheless, the conflict

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[3] See *United States* v. *Beatty*, 587 F. Supp. 1325 (E.D.N.Y. 1984) (permitting prosecution under Section 1503 for urging witnesses to give false testimony to grand jury and for providing misleading handwriting samples to grand jury). In *United States* v. *King*, 762 F.2d 232, 238 (1985), cert. denied, 475 U.S. 1018 (1986), the Second Circuit noted that "[w]e agree with the courts in *United States* v. *Lester* [749 F.2d 1288 (9th Cir. 1984)] and *United States* v. *Beatty* that the legislative history of § 1512 does not suggest that Congress intended that section, as enacted, to reach modes of conduct other than those there enumerated." That conclusion suggests that in an appropriate case, the Second Circuit would be prepared to find that because the prohibition against conduct of the sort at issue in this case was not transferred to Section 1512, that conduct remains within the reach of the omnibus clause of Section 1503. Significantly, the Second Circuit in *King* noted that Section 1503 was inapplicable in that case only because there was no judicial proceeding pending at the time of the defendant's conduct; the court did *not* suggest that witness tampering of the sort at issue there is not within the reach of Section 1503 even when there is a judicial proceeding pending, as in this case.

[4] See *United States* v. *Risken*, 788 F.2d 1361, 1367-1369 (8th Cir.), cert. denied, 479 U.S. 923 (1986) (Section 1503 reaches attempts to hire a person to kill a grand jury witness and engaging in misleading conduct with respect to another grand jury witness); *United States* v. *Rovetuso*, 768 F.2d 809, 824 (7th Cir. 1985), cert. denied, 474 U.S. 1076 (1986) (Section 1503 reaches efforts to arrange for the murder of a

among the circuits may be resolved, at least as to cases such as this one, if the Second Circuit is called upon to decide a case involving a prosecution under Section 1503 for a type of witness tampering that would not be prosecutable under Section 1512. If the Second Circuit finds that type of conduct to be within the reach of Section 1503, the conflict will be reduced to a technical one of no great importance, since the remaining cases of witness tampering will be subject to prosecution either under Section 1512 alone (in the Second Circuit) or under either Section 1503 or Section 1512 (in all other circuits). On the other hand, if the Second Circuit holds that witness tampering that is outside the reach of Section 1512 is also outside the reach of Section 1503, that court will have created a serious gap in the statutory coverage, and the conflict will have sharpened. Unless and until the Second Circuit takes that step, we submit that it is unnecessary for this Court to review the question.

2. Petitioner next contends (Pet. 23-33) that the Medicare and Medicaid fraud statutes, former 42 U.S.C. 1395nn and 1396h,[5] did not apply to his conduct because there was no showing that the services for which claims were made were not performed or provided. The court of appeals was correct in holding that the statutes do not require any such proof.

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witness); *United States* v. *Lester*, 749 F.2d 1288 (9th Cir. 1984) (Section 1503 reaches noncoercive witness tampering, including hiding a witness); *United States* v. *Wesley*, 748 F.2d 962 (5th Cir. 1984), cert. denied, 471 U.S. 1130 (1985) (Section 1503 covers urging and advising a witness to testify falsely).

[5] The statutes under which petitioner was convicted were repealed on August 18, 1987. See Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93, § 4(e), 101 Stat. 689. The statutes have been recodified in modified form as 42 U.S.C. 1320a-7b.

By its plain terms, Section 1395nn(a)(2) provides that anyone who "at any time knowingly and willfully makes or causes to be made any false statement or representation of a material fact for use in determining rights to any such benefit or payment [under this subchapter] * * * shall (i) in the case of such a statement [or] representation * * * by any person in connection with the furnishing (by that person) of items or services for which payment is or may be made under this subchapter [pertaining to Medicare]" be liable for punishment. Section 1396h(a)(2) contains identical language criminalizing the making of false statements or representations with respect to claims for payment made under the subchapter pertaining to Medicaid. Nowhere in this unambiguous statutory language is there the least indication that Congress meant to limit the reach of the statutes, as petitioner would have it, to false statements made with respect to the nonprovision of services. To the contrary, the statutes encompass any "false statement or representation" regarding any "material fact for use in determining rights to any * * * payment" in connection with the providing of services under the respective subchapters.

Thus, to prove Medicare or Medicaid fraud, the government need only show "a knowingly false statement of material fact made in an application for benefits from a federally approved * * * plan." *United States* v. *Larm*, 824 F.2d 780, 782 (9th Cir. 1987), cert. denied, 108 S. Ct. 1057 (1988). In turn, a representation is "material" if it "is necessary 'to put the claimant in a position to receive government benefits, whether rightfully or wrongfully,' " *i.e.*, if it is capable of influencing the administrative determination. *United States* v. *Brown*, 763 F.2d 984, 993 (8th Cir.), cert. denied, 474 U.S. 905 (1985). As the court below correctly observed (Pet. App. 15-16), petitioner's

conduct fell squarely within the statutory proscription, because

> the factual basis of the charges against [petitioner] established that [petitioner], knowing that he had been suspended from participation in the Medicare/Medicaid programs, caused either Dr. Malsky's or Dr. Baer's provider number to be placed on the application for Medicare and Medicaid payment when in fact [petitioner] had furnished the medical services for which payment was to be made [, and since] * * * [petitioner's] representations clearly put his corporation in a position to receive payments to which it was not entitled.

In sum, petitioner made false statements that enabled him to receive federally funded remuneration that would have been denied out-of-hand if petitioner's identity as the health care provider had been known. That was a proper factual basis for the fraud counts, irrespective of whether the patients actually received medical treatments and services. See *United States* v. *Cegelka,* 853 F.2d 627, 628-630 (8th Cir. 1988), cert. denied, 109 S. Ct. 798 (1989) (although evidence conflicted as to whether psychological testing was performed, defendant was properly convicted since he misrepresented that testing had been ordered by a referring physician); *United States* v. *Larm,* 824 F.2d at 782-783 (although patients received treatments, defendant was properly convicted, because billing codes misrepresented that treatments were personally administered by the authorized provider). See also *United States* v. *Bay State Ambulance & Hospital Rental Service, Inc.*, No. 88-1866 (1st Cir. May 2, 1989), slip op. 22-29 (under anti-kickback provisions of Section 1395nn, it is not a defense that the payments the physicians received were reasonable compensation for actual work performed).

As petitioner notes (Pet. 26), Congress was unquestionably concerned with the practice of billing for services that were not actually performed when it enacted the Medicare and Medicaid fraud statutes. But if that had been Congress's exclusive purpose, it would have framed the statutory language to reach only that kind of fraud. Rather, Congress was generally concerned with maintaining the integrity of the health-delivery systems that receive federal funding. Petitioner had already been suspended from participating in that system because of irregularities involving his past billing practices (see Tr. 32-33). In the absence of clear statutory language to the contrary, it is sensible to conclude that Congress intended to include within the reach of the false statement provisions a physician's misrepresentation of the identity of the actual health-care provider, where the purpose of the misrepresentation is to enable a disqualified physician to participate in the fruits of the federally funded programs.

3. Petitioner contends (Pet. 36-40) that the district court violated Fed. R. Crim. P. 11 by failing to inquire adequately as to the factual basis for the plea and as to petitioner's understanding of the charges against him. This claim is frivolous.

A criminal defendant may collaterally attack a plea-based conviction on the ground of a Rule 11 violation only if non-compliance with the procedural safeguards of the Rule resulted in a "complete miscarriage of justice." *United States* v. *Timmreck*, 441 U.S. 780, 783-784 (1979). In this case, however, there was no Rule 11 violation at all. As the record reveals, the three counts of the indictment to which petitioner pleaded guilty were read verbatim in open court (Tr. 25-26), after which the court asked if petitioner had committed the acts with which he was charged (Tr. 27). Petitioner replied that he believed "that those counts are correct" since he "goofed" and "made a mistake"

(*ibid.*). Thereafter, the prosecutor recited in extraordinary detail not only the factual basis for the three counts at issue, but the context of those counts within petitioner's overall scheme to defraud and to obstruct justice (Tr. 27-69).

The court thereafter inquired whether petitioner understood those charges, whether he had satisfactorily discussed them with his attorney, and whether he had any questions about them (Tr. 71, 74-76). At the court's request, petitioner summarized the gravamen of each of the counts (Tr. 75-76). Finally, petitioner repeatedly assured the court that he "agree[d]" with the prosecutor's summary "on the three counts," that he had made "mistakes" for which he was "responsible," and that he was pleading guilty because he was in fact guilty (Tr. 70, 73-74, 77). In light of the district court's exceptionally detailed and careful inquiry, there is no merit to petitioner's claim that he was not apprised of the charges against him.[6]

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[6] Petitioner argues that he did not acknowledge performing the acts willfully and knowingly (Pet. 37) and that his admissions of guilt were "equivocal" (Pet. 39-40). It was made crystal clear to petitioner, however, that knowledge and intent were elements of the fraud counts (see Tr. 10-12, 25-26). During the initial aborted plea proceeding, petitioner stated that he "did not believe that [he] was willfully and knowingly submitting false claims" with respect to the patient who was the subject of Count 15 (Tr. 19); accordingly, the court refused to accept petitioner's plea on that count (*ibid.*). By contrast, petitioner admitted that he wrongfully submitted the claims involved in Counts 10 and 24, on which the court accepted his pleas (see Tr. 19-20, 70, 73-74). That episode graphically illustrates that petitioner understood the mens rea element involved and that the court would not accept a plea on any count as long as petitioner disputed that element.

Similarly, as the court of appeals correctly noted (Pet. App. 13), petitioner's " 'equivocal' statements reveal at most that his interpretation of the facts differed from the government's version. They d[id] not place in question whether he willfully and knowingly made a false statement or representation of material fact * * *." Thus, while petitioner disagreed with "a lot of aspects" of the government's lengthy

4. Finally, petitioner contends (Pet. 34-35, 40-46) that he was deprived of his Sixth Amendment right to the effective assistance of counsel because his attorney failed to raise legal challenges to the indictment, failed to object to the alleged inadequacy of the Rule 11 proceedings, and failed to prosecute an appeal following his conviction. As this Court stated in *Strickland* v. *Washington,* 466 U.S. 668 (1984), a criminal defendant seeking to establish a deprivation of his Sixth Amendment right to the effective assistance of counsel must demonstrate both that his counsel's performance was deficient, and that the deficient performance prejudiced the defense so as to deny him a fair trial. The same test applies to attacks on guilty pleas based on allegedly ineffective assistance of counsel. *Hill* v. *Lockhart,* 474 U.S. 52 (1985). Petitioner has failed to satisfy either requirement of the test.

As we have shown, the plea proceeding amply comported with the requirements of Rule 11, and the fraud and obstruction of justice counts alleged facts constituting offenses under the respective statutes involved.[7] Thus, petitioner's counsel was not remiss for failing to challenge those aspects of the proceedings. Moreover, the court of appeals, on whose opinion we rely, considered and rejected each of petitioner's other complaints regarding the performance of counsel. As the court there noted, the

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factual recitation, he unqualifiedly agreed to the truth of the allegations in the three counts to which he pleaded guilty (Tr. 70).

[7] As the court of appeals noted (Pet. App. 24), it was not unreasonable for petitioner's counsel not to challenge the obstruction of justice count, since clear law in the Fifth Circuit foreclosed such a challenge, and since the overwhelming weight of authority in other circuits supported the Fifth Circuit's view.

obstruction of justice count was not duplicitous (Pet. App. 21-22), and there was no basis for seeking the suppression of consensually recorded conversations between petitioner and the witness whom he attempted to influence (*id.* at 23-24).[8] The court of appeals further noted that petitioner's allegation that his attorney induced a guilty plea by promises regarding the sentence he would receive were "directly refuted by [petitioner's] own sworn testimony at his plea proceeding and at the evidentiary hearing before the district court" (*id.* at 25). Lastly, since petitioner waived his right to appeal by pleading guilty, the court found that counsel's effort to challenge petitioner's sentence by way of a Rule 35 motion to reduce sentence, rather than by direct appeal, was proper (*id.* at 28-30).[9] In short, petitioner has failed to identify any respect in which his counsel's performance was substandard or any way in which he was prejudiced by any alleged default on counsel's part.

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[8] Petitioner suggests that his attorney should have raised an entrapment defense with respect to the obstruction of justice count, but he has failed to suggest any colorable basis for such a defense, and his admissions at the guilty plea proceeding make it clear that he was factually guilty of that charge.

[9] Petitioner also claims (Pet. 35-36) that the government breached its promise in the plea bargain (see Tr. 23) "[n]ot [to] make any recommendation as to sentence." In fact, the government made no recommendation as to sentence. Rather, it merely submitted its version of the facts to the probation officer for inclusion in the presentence report and later, after sentence had been imposed, opposed petitioner's Rule 35 motion for reduction of sentence. Neither of those actions was contrary to the terms of the plea agreement.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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